Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

No. 78-1530

ROBERT W. MILLER and PATRICIA M. MILLER, and HAROLD R. MILLER and BERNICE MILLER,

Petitioners,

vs,

THE FEDERAL LAND BANK OF SPOKANE, a foreign corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

ROBERT W. MILLER and PATRICIA M. MILLER, AND HAROLD R. MILLER and BERNICE MILLER, Plaintiffs, THE FEDERAL LAND BANK OF SPOKANE, a foreign corporation, Defendant.	)	Civil No. 1139 Circuit Court of Appeals No. 76-1216

I, LOU ALEKSICH, Clerk of the United States District Court for the District of Montana, do hereby certify that I am transmitting herewith supplemental to the record relative to the plaintiffs' Petition for a Writ of Supervisory Control in the above entitled cause the following additional documents, instruments, and papers:

Date	Instrument	Appendice No.
10/12/78	Opinion	A
12/7/78	Order	B
6/5/75	Judgment	C
6/16/66	Federal Farm Loan Amortization Mortgage	D
June 2, 3,4,5, 1975	Transcript Volume One	E
	Jury Instructions	F
	Montana Statutes Sec. 17-201 and Sec. 17-208	G
7/14/76	Brief of Defendant-Appellant	H

IN WITNESS WHEREOF I have set my hand and affixed the seal of said District Court at Billings this 1st day of March, 1979.

LOU ALEKSICH, Clerk

By Judy A. Bishop
Deputy

(SEAL)

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

ROBERT W. MILLER, PATRICIA M. MILLER, HAROLD R. MILLER and BERNICE MILLER, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 12, 1978.

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana is reported in 371 F.Supp. 1105 and is printed in Appendix A hereto, infra page A-1. The decision of the United States Court of Appeals appears in 371 F. Supp. 1105 and is printed in Appendix A hereto, infra page A-1. The Journal Entry of Judgment of the United States District Court is printed in Appendix C hereto,

infra page C-1. The Journal Entry of Judgment of the United States District Court is printed in Appendix C hereto, infra page C-1.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was made and entered on October 12, 1978. The Appellees' Petition for a Rehearing in Banc was denied, and the suggestion of a rehearing in banc was rejected without a vote, on December 7, 1978. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Through error the Court of Appeals grossly misconstrued a Federal District Court opinion and in so doing held that the partial release policies of a Spokane, Washington, Federal Land Bank were valid and had been fairly administered.

1. Can a Federal Land Bank, as a mortgagee, enter into a written mortgage

agreement which provides for a long term fixed rate of interest, and then subsequently make several amendments to it's housekeeping and policy rules, without the consent of the mortgagors, and thereby jack up the interest rates contrary to the terms of the original mortgage agreement?

2. Whether the Circuit Court in a diversity case is required to follow the substantive law of the state where jurisdiction lies.

3. Whether the decision of the Circuit Court has permitted the Federal Land Bank to circumvent Sec. 93-6001, of the Revised Codes of Montana 1947, and to unlawfully force a mortgagor to comply with the Banks demands of electing between entering into a new mortgage and paying higher interest rate than what was originally contracted for, or the alternative of facing a forced accelerated mortgage payment plan?

4. Whether a mortgagee under the Montana law has any right to demand immediate compensation and a profit from the proceeds of a sale of a right of way easement, negotiated by a mortgagor, in excess of the purchase price paid for said easement, where all mortgage payments have been promptly paid over the years and the security for the mortgage has increased in value, and is not impaired in any manner?

5. Whether the Federal Land Bank can nullify and void Montana laws, by the unilateral amendments of its own policy rules after it has entered into written contractual mortgage agreements with borrowers?

6. Whether the United States District Court properly ruled on evidentiary matters under the Montana law and properly submitted the issue of punitive damages to the jury?

7. Can the Circuit Court of Appeals

ignore and fail to apply the Montana statutes governing an award of money for damages and punitive damages.

8. Whether under the Montana law, an award of nominal damages will support an award for punitive damages?

STATEMENT OF CASE

This is a diversity case brought by a Montana ranch family, Millers against the Federal Land Bank of Spokane.

The action involved entitlement to the proceeds ($31,400.00) of a partial conveyance of mortgaged land. The conveyance to the Burlington Northern Railroad represented only 8 of 2,600 acres under mortgage to the Federal Land Bank, or a mere 0.31% thereof.

The Burlington Northern had filed a condemnation action against the Millers. After filing the Complaint, but before any hearing, the parties entered into a negotiated settlement and the action

was dismissed. But before settling with the railway company the Millers met with the Federal Land Bank and were advised that the Federal Land Bank would require payment upon the mortgage of only one-half of the settlement payment allocated to the 8 acres of land to be used for railroad right of way purposes. It was agreed that the Millers could keep the other half and all of the money paid for damages to the remainder of their property.

The settlement check was made payable to the Millers and the Federal Land Bank of Spokane. The Millers, according to their agreement with the Bank, offered one-half of the amount ($2,354.00) attributable to the 8 acre land value. The Bank refused to endorse the check, demanding one-half ($15,700.00) of the total settlement payment, or in the alternative make the Millers enter into a new mortgage

at a higher interest rate.

The Bank predicated their right to one-half of the total compensation solely upon an eminent domain clause in the mortgage. (See Appendix page D-1 .

The Millers filed an action in the Federal District Court for Montana on March 7, 1973. The First Count charged the Bank for fraud in demanding one-half of the total payment by the railroad of $31,400.00. The lower portion of the railroad payment check contained a break down allocation evidencing that $4,708.00 was paid for the land and damages of $26,692.00, which totaled said $31,400.00

The second count sought a judgment of the District Court declaring that the eminent domain clause was not applicable under the facts of this case and should not control the disposition of the 8 acre right of way sale proceeds.

The District Court granted judgment on Count 2, and Count 1 was tried before

a jury. After a lengthy trial, the jury awarded the plaintiffs $3,500.00 in actual damages and $20,000.00 in punitive damages.

STATUTES INVOLVED

The following statutes are involved;

Sec. 17-201 R.C.M. 1947

> PERSON SUFFERING DETRIMENT MAY RECOVER DAMAGES. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

Sec. 17-208 R.C.M. 1947

> EXEMPLARY DAMAGES - IN WHAT CASES ALLOWED. In any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

RULINGS BELOW

At the District Court level both parties moved for summary judgment on the validity and applicability of the mortgage eminent domain clause.

Ruling in favor of the Miller's motion, the lower court held that since the eight acres were not taken under the right of eminent domain the clause was not applicable to disposition of the proceeds from the right of way easement conveyance, and in the alternative held that under the circumstances of the case the clause which purported to allow the Bank to take all the compensation, was invalid.

In the summary judgment proceedings the District Court did not rule on the Federal Land Bank policies on partial releases of mortgaged land. Those policies were not in issue in the declaratory judgment count. Particularly the Court's decision did not characterize the policies as "inequitable, unconscionable or shocking" as applied to the case.

The summary judgment granted the Millers the right to the settlement check together with interest and attorney fees.

The fraud count resulted in a jury

verdict in favor of the Millers. The judgment entered (Appendix page C-1 awarded $3,500 compensatory and $20,000 punitive damages.

Appeal was taken to the United States Court of Appeals for the Ninth Circuit from the partial summary judgment and from the judgment upon the jury verdict.

The Court of Appeals reversed and remanded the partial summary judgment and dismissed the claim for fraud and deceit.

THE PARTIAL SUMMARY JUDGMENT

The Court of Appeals seriously misread, misinterpreted and misconstrued the District Court opinion granting the Millers summary judgment on the declaratory count.

The Court confused the eminent domain clause of the mortgage, the subject of the count, with partial release policies of the Bank. These policies were not in issue and were not ruled upon by the

lower court in the summary judgment proceeding. At that state the Bank's position was that the eminent domain clause was applicable, valid, and uniformly administered.

The Court agreed with the District Court that the clause was not applicable (587 F.2d 419, Appendix page A-1), but then incorrectly states that the lower court held that the Bank could not rely upon its partial release policies, that they were unconscionable and had not been uniformly applied. (ibid 419, 420, Appendix page A-1).

The District Court did not so rule. Its ruling was on the eminent domain clause not the Bank's policies.

The Court's opinion repeats this statement twice (ibid, p 420, 421 Appendix page A-1) then holds:

> We do not think that the record justifies summary judgment on such grounds.

PARTIAL RELEASE POLICIES

The error discussed above resulted in

the Court analyzing and ruling on the Bank's partial release policies, and in doing so the Court made this error.

The partial release policy in effect at the date of the mortgage was consonant with the Bank's original agreement to require payment of only one-half of the land value portion of the settlement with the Railroad. Entitlement to one-half of the entire settlement is predicated on policy amendments made after execution of the mortgage (ibid p 420, 421 Appendix page A-1).

What was the mutual intention of the parties at the time the mortgage was entered into? Did the release policy in effect on that date become part of the contract?

If part of the mortgage contract, it could not be unilaterally changed by policy amendments. Since the policies were not in issue in the summary judgment proceeding the legal implications of

those policies to the mortgage contract were not briefed and argued.

In further discussion of the Bank's policies, the Court in support of its view that the policies were not unreasonably applied in this case concludes that the Bank's security was drastically reduced (ibid 421, Appendix page A-1).

The Court bases this on the incorrect assumption that two months before the condemnation action, the Millers contracted to sell the entire property under mortgage for $89,500.00. The Court states, "Thus at that time the mortgage amounted to just under one-half of the total purchase price." (ibid p 421, Appendix page A-1). The Court then escalates its error by speculating that the demand of the Bank is a "means of preventing impairment of its security, was by no means unreasonable, . . ."

The correct facts are that the Millers sold only some of the pasture land, not

the entire 2,600 acres, and the buyer leased the remainder. (Tr. p 118, L. 20-21 Appendix page A-1).

The Bank admitted in open court at the District Court level that its security was not impaired by the partial conveyance of less than 1% of the total acreage (371 F.Supp. 1107, 587 F.2d 421, Appendix pp E-1 ____). Through error the Court grossly erred in supposing that the value of the ranch between June 9, 1972 and November 6, 1972 "the value of the ranch had shrunk from $89,500 to $55,100." (ibid p 421, foot note 2) There are no facts in the record which will support such an outlandish assumption.

The Court's foregone conclusion stemming from this gross error is that the policies applied to this case were not truly unconscionable. Just the opposite is indicated.

AGREEMENT ON PARTIAL RELEASE

The issue whether the Bank had agreed to a partial release in return for one-half of the land value portion of the settlement is returned to District Court for determination (ibid p 422, 423 Appendix page A-1). This is error. In the trial on the fraud count, the jury, in its verdict found such an agreement based on the evidence and instructions (Instructions 2, 3, 4, 5 & 6 TR. p. 520-526 Appendix page F-1).

FRAUD CLAIM

The Circuit Court erroneously set aside the findings of the jury and dismissed the Count in fraud and deceit. The Court then ignored the Montana statutes on damages Sec. 17-201 and 17-208, R.C.M. 1947, and then by pure speculation assumed that the only damages sustained by Millers was in the delay in the receipt of the settlement payment from the Railroad Company. (ibid p 423, 424 Appendix page A-1). Then as a consequence, of such

erroneous rationale the jury's award of punitive damages was also reversed. The jury found the fraud guided by the instruction (cited ibid p 423 Appendix page 2-6). The Bank, in its appeal, did not list reliance as an issue for review. It argued failure of damages and negligent misrepresentation. Thus, the Circuit Court erred in overturning the jury verdict and interjected non-appealed issues into the case.

The Montana statutes cited by the Circuit Court pertaining to damages are not contrary to the verdict rendered in the District Court, nor do they apply to a fraudulent withholding.

The Controlling and proper Montana statutes, which were ignored by the Circuit Court are Section 17-201, R.C.M. 1947, providing compensation in money for a detriment suffered by the unlawful act of another, and Sec. 17-208, R.C.M. 1947 (Appendix page G-1)

which allows pre-judgment interest in every case of oppression, fraud or malice. The Circuit Court's ruling is directly contrary to the state decisions contained in State ex rel Larson v. District Court, 149 Mont. 131, 423 P.2d 598; Wright v. City of Butte, 64 Mont. 362, 210 P. 48; Dewell v. No. Pac. Ry. Co., 54 Mont. 350, 170 P. 752.

In the present case, the jury awarded $3,500.00 compensatory damages which the Bank acknowledged represents $200.00 to $300.00 more than the pre-judgment interest. (Def. Appeal Br. P 37, Appendix page H-1). Since the compensation award is not broken down, the Court should not substitute its judgment for the jury's, as to how much represents pre-judgment interest, or other items of damage such as increase in land leveling costs and greater interest rates on loans made pending cashing the settlement check.

PUNITIVE DAMAGES

The Court holds that, since the

only damage sustained was delay in obtaining the settlement money, legal interest is the measurement, and punitive damages do not lie. Pursuant to Montana law, punitive damages were properly allowed. (Sec. 17-208 R.C.M. 1947. Appendix page G-1) That section requires that actual damages be sustained. Actual and compensatory damages are synonymous. (Purington v. Sound West , 566 P.2d 795, 798). Nominal damages are actual damages whether established by proof or implication of law (Fauver v. Wilkoski, 123 Mont. 228, 211 P.2d 420)

Pre-judgment interest represents actual damages. But aside from that interest, the compensatiory damage was $200.00 to $300.00 more than interest. That may be nominal; it is, however, actual damage and will support an award of punitive damages under Montana law.

REASONS FOR GRANTING WRIT

The Farm Credit Administration which supervises the Federal Land Banks is

not an ordinary commercial enterprise. It was created by Congress to provide loans to farmers at interest as low as will allow it to be solvent and reasonably secure. There are 12 federal land banks and 686 affiliated land bank associations. Since the farmers who borrow from the banks must become members, a fiduciary relationship is created. As of June 31, 1977, there were 66,837 loans in effect.

The policies of these banks and the administration of those policies are important in fulfilling the congressional objectives and are of great importance to farmers nationally, and particularly so in these times of spiralling inflation.

However, the housekeeping and policy rules cannot be allowed to automatically amend and change the laws of the state in which the Bank chooses to operate.

The decision of the Court of Appeals

in this case through error, conjecture and assumptions not founded by the record of the case departs from the usual course of appeal and if allowed to stand seriously weakens the integrity of the jury process.

The decision is in total conflict with Montana law on fraud and deceit, and punitive damages. It will create confusion of state law within the state, and unless clarified will erroneously and unnecessarily complicate legal proceedings within the State of Montana.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

DATED this 1st day of March, 1979.

Respectfully submitted,

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By William T. Kelly

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APPENDIX A

OPINION, United States Court of Appeals

Date: October 12, 1978

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W. MILLER and PATRICIA M. MILLER, and HAROLD R. MILLER and BERNICE MILLER, Plaintiffs-Appellees, vs. THE FEDERAL LAND BANK OF SPOKANE, Defendant-Appellant.	No. 76-1216 OPINION

Appeal from the United States District Court for the District of Montana

Before: DUNIWAY and WRIGHT, Circuit Judges, and KUNZIG, *Judge, United States Court of Claims

DUNIWAY, Circuit Judge:

In this civil action, jurisdiction rests upon diversity of citzenship. The plaintiffs (the Millers) are citizens and residents of Montana and the defendant is a federally chartered federal land bank

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*The Honorable Robert L. Kunzig, sitting by designation.

having its principal office in Spokane, Washington.

The appeal is from a judgment in favor of the Millers, upon a verdict in their favor in a trial of certain issues to a jury, together with an earlier partial summary judgment.

I. The Facts.

The Millers were the owners of a 2,600 acre ranch in Treasure County, Montana. On June 5, 1966, they borrowed $47,800 from the defendant, the Federal Land Bank of Spokane (the Bank), at an interest rate of 5-1/2%. As security for the loan, the Millers mortgaged the ranch to the Bank. The loan was payable in annual amortizing payments of $3,999.88, beginning on May 1, 1967, the last payment being due on May 1, 1986.

On August 28, 1972, the Burlington Northern Railroad (the Railroad) filed a condemnation action against the Millers,

seeking to condemn a right of way easement for railroad purposes across 8 acres of the Millers' land. The action named the Millers and the Bank as defendants. Shortly thereafter, the Millers negotiated a settlement with the Railroad, in which the Railroad agreed to pay the Millers $31,400. The settlement check was issued on November 6, 1972, and was made payable to Robert W. Miller and Patricia M. Miller and the Bank. Attached to the check was a statement breaking down the payment made as follows:

> Payment in full for land and damages in connection with the purchase of right of way . . .
>
> | | |
> |---|---|
> | Land | $ 4,708.00 |
> | Damages | 26,692.00 |
> | Total | $31,400.00 |

The Federal Land Bank Association of Billings, Montana, (the Association) acts as an agent for the Bank in negotiating loans and servicing loans to farmers under

the federal statutes creating the federal land banks. See 12 U.S.C. §§ 672 et seq. The federal land banks were created for the purpose of lending money at low interest to farmers. A farmer who wishes to borrow money from a federal land bank makes an application through the appropriate association and the association, after obtaining the necessary information, makes a recommendation to the bank that the loan be granted. If a loan is granted, the borrower must become a member of the association by buying its stock, and must pledge the stock to the bank as further security for the loan.

The Millers claim that, when they learned of the Railroad's desire for a right of way, they consulted with officers of the Association in Billings and were told by those officers that the Bank would demand only one-half of whatever part of the moneys obtained from the Railroad

was allocated to the taking of the 8+ acres that the Railroad desired to acquire, and that the Millers could keep the other one-half of that amount, together with all moneys, if any, that were awarded as damages arising from the effect of the taking upon the remaining acreage of the ranch. The Millers therefore claimed, in the first count of their complaint, that they should only be required to pay to the Bank one-half of the $4,708.00, i.e., $2,354.00, which the attachment to the Railroad's check assigned to the value of the land taken.

They also assert that they were thereafter told by agents of the Association and the Bank that the Bank had taken the position that they would have to pay the Bank one-half of the total amount paid by the Railroad, that is, $15,700.00, or, if they did not do so, the Bank would not endorse the check and, consequently, the

Millers could not cash it. The Millers allege that they told the Manager of the Association that they would pay one-half of the amount paid for the land, namely, $2,354.00.

In their complaint, filed March 7, 1973, which contains two counts, the Millers alleged, in the first count, the foregoing claim and charged the Bank with fraud in demanding one-half of the total $31,400.00 settlement. They also alleged that the Bank demanded that they either pay one-half of the settlement or agree that they would enter into a new mortgage with a higher annual interest rate for the balance then due on the loan from the Bank. They claimed that they had been defrauded and that by reason of the fraud, they were entitled to $29,046.00 of the proceeds of the check, and to compensatory damages of $25,000.00, punitive damages of $75,000.00, interest on the $29,046.00 at the rate of

10% from November 10, 1972, the date of the settlement check, and other relief.

In their second count the Millers repeated the allegations of the first count and then alleged that the Bank was relying upon a provision in the mortgage (the eminent domain clause) which reads as follows:

> If any of the mortgaged property shall be taken under right of eminent domain, the mortgagee (the Bank) shall be entitled at its option to receive all compensation for the portion taken and damages to the remaining portion, to be applied by the mortgagee upon the indebtedness hereby secured in such manner as it shall elect.

They alleged that this provision was "arbitrary, confiscatory, inequitable, invalid . . . without consideration, and would deprive the plaintiffs of property and liberty without due process of law." They asked for a judgment that the eminent domain clause was invalid and unenforceable. They further alleged that the clause has been waived by the Bank in some cases,

has not been uniformly enforced against its mortgagors, and that by not enforcing it uniformly, the Bank has violated the provisions of the Act creating it, 12 U.S.C. §§ 636-1012. They concluded their second count by alleging that they were entitled to the entire $31,400.00, the principal amount of the settlement check.

Thereafter, each of the parties filed a motion for summary judgment, the Bank claiming that the clause above quoted is valid and enforceable, that the Bank administered it uniformly, and that, independent of the clause, its policies, under which it claimed one-half of the total payment by the Railroad, were valid and uniformly applied.

The court denied the Bank's motion for summary judgment and granted that of the Millers. It rendered an opinion which is reported in Miller v. Federal Land Bank, D. Mont., 1974, 371 F. Supp.

1105. In that opinion, the court held, first, that the eminent domain clause did not apply because the land was not taken in a condemnation proceeding under the right of eminent domain, but was sold to the Railroad by the Millers in a compromise. Second, the court held that, assuming that the eminent domain clause applied to the case, it was void because its enforcement would shock the conscience of the court, particularly in light of the fact that, as the court said, the clause has not been uniformly enforced by the Bank. Accordingly, the court awarded the Millers a partial summary judgment which ordered the Bank to endorse the check mentioned above, free and clear of any claims on its behalf, so that the same could be cashed by the plaintiffs, and to pay the Millers interest on the sum of $31,400.00 from November 8, 1972, to April 22, 1974,[1/] at 6%, together with

costs of suit and attorneys' fees of $4,823.33. In that judgment it also ordered that the Bank recover nothing against the Millers.

Thereafter, the court held a jury trial on the charge of fraud in the first count which resulted in a verdict in favor of the Millers. The judgment entered on the verdict awarded the plaintiffs $3,500.00 compensatory damages and $20,000.00 punitive damages. It is from the final judgment and the partial summary judgment that this appeal is taken by the Bank.

II. The Validity and Effect of the Eminent Domain Clause in the Mortgage.

The trial judge, as we have seen, held both that the clause did not apply under the facts of this case and that, if it did apply, it was invalid. We need not decide the latter question. We very much doubt that the clause, if applicable, is invalid. However, we do not decide the question because we agree with the trial judge that

the clause does not apply to this case.

The clause deals with a situation in which a mortgaged property "shall be taken under the right of eminent domain" and the disposition of "all compensation for the portion taken and the damages to the remaining portion." Here, although the Railroad filed an action to condemn, the action was never tried, and never went to judgment. On the contrary, the Millers contracted with the Railroad to sell the right of way to the Railroad and to receive a certain amount of money in return. This is not literally the taking of property under the right of eminent domain nor compensation for such a taking. The clause was drafted by the Bank, and under well established principles it is to be construed against the Bank. Under these circumstances, we agree with the trial judge that the clause does not apply to this case, and we decide nothing about

its validity if it did apply.

III. The Bank's Policy Regarding the Proceeds of Partial Conveyances of Mortgaged Property.

The record shows that from a time before the loan was made to the Millers and the mortgage was given to the Bank until the present, the Bank has had in effect certain policies regarding the disposition of proceeds of partial conveyances of mortgaged property. These policies are not limited to but do expressly apply to the proceeds of condemnation of a portion of the mortgaged land. The Bank contends that under these policies, it was proper to demand one-half of the recovery that the Millers agreed to with the Railroad. The court held that this too was unconscionable and that the Bank could not rely upon its policies both for that reason and because, as the court said, the Bank had not uniformly applied these policies. With these views of the district court, we find ourselves in

disagreement.

Under the laws of Montana, which is a "lien" state, a mortgage does not convey any title in the mortgaged lands to the mortgagee. It does create a lien, but the Supreme Court of Montana has held that in a condemnation action, the condemning body need not name the mortgagee as a defendant or bring the mortgagee into the case. Claver v. The District Court of the Thirteenth Judicial District, Mont., 1972, 499 P.2d 1228, 1235:

> Furthermore, in Montana it is established that a mortgage does not create an estate in real property but is mere security for payment of a debt or discharge of an obligation--it creates a lien upon the property. Cornish v. Woolverton, 32 Mont. 456, 81 P. 4; Barth v. Ely, 85 Mont. 310, 278 P. 1002. Therefore, Nichols on Eminent Domain, 3rd Ed. Vol. 2, §5,741, states that in jurisdictions such as Montana:
>
> > "* * * in the absence of express statutory requirement, the mortgagee need not be made a part, or be notified of the proceedings, and he is not entitled to compensation from the condemnor."

> We hold that it is unnecessary for the Commission to bring a quiet title action or name additional defendants.

The court held that the lien holder mortgagee could look only to the proceeds of the condemnation.

It is quite understandable that when the land was being sold, not condemned, the Railroad made its check payable to the Millers and the Bank. Only in this way could it avoid the possibility of liability to the Bank arising from paying over the amount of the settlement to the Millers without the consent of the Bank. A mortgage imposes a lien on all of the property mortgaged. Thus the 8+ acres involved in the condemnation action and settlement were a part of the security for the Bank's loan.

"(A) mortgagee cannot be compelled to accept a part of his debt and release a corresponding part of the land, unless he has expressly agreed to do so. . . ."

59 C.J.S., Mortgages, § 479, p. 757. We know of no law that would prevent the Bank from demanding a portion of the proceeds of a sale of a part of the mortgaged property as consideration for its willingness to release its lien upon the portion sold, at least provided that what it does is not truly unconscionable. We are unable to agree with the district judge that the Bank's stated policies or its administration of them, as disclosed by the record, are unconscionable.

The record shows without contradiction that at the time that the loan was made and the mortgage was given on June 6, 1966, interest rates were reasonably stable. At that time, the Bank's written policies, in effect since January 25, 1961, dealing with partial releases, read as follows:

> GENERAL POLICY
>
> Loans. A partial release of the security for a loan . . . may be granted under any of the following

conditions provided the credit factors are favorable.

1. Without any payment or other adjustment on the loan when

(a) The remaining security is sufficient to support the balance of the loan on the basis prescribed for new loans and the interest rate on the loan is at least equal to the bank's minimum refunding rate applicable to the loan; . . .

Shortly after, on July 1, 1966, subparagraph (a) of the policy was amended in part to read as follows:

(a) The remaining security is sufficient to support the balance of the loan on the basis prescribed for new loans and the interest rate on the loan is 5-1/2% or more; . . .

There was another amendment on December 1, 1966:

(a) The remaining security is sufficient to support the balance of the loan on the basis prescribed for new loans and the interest rate on the loan is the rate currently

being charged on new loans;. . . .

On March 21, 1969, because of the changes in the money market, the policy statement was again changed, to provide for two different policies, one dealing with "Current Interest-Rate Loans" and the other dealing with "Less than current rate loans." The policy for current interest-rate loans was similar to that previously in effect for all loans. The new policy related to less than current rate loans:

Less than current rate loans. If the interest rate on the loan is less than the rate currently being charged on new loans, the granting of the partial release will be conditioned upon

(1) The payment of at least one-half of the present market value or sale price, including severance damages of the security to be released (whichever is higher) for application on the balance of the loan even though the remaining security is ample to support the remaining loan; . . .; or

(2) The payment of an amount necessary to reduce the remaining loan to the maximum loanable and re-amortizing the balance at the rate currently being charged on reamortized loans unless the loan is already written at this rate.

There was an exception for cases in which the sale of the security to be released was nominal and inconsequential, meaning worth less than $2,000.00 or 10% of the loan balances, a provision not applicable in our case.

These provisions were again changed on April 9, 1969, but remained substantially the same where the loan involved was at an interest rate lower than 7%. The figure was raised from 7% to 8% on July 24, 1969, and this was continued in effect on December 16, 1969. This is the provision which was in effect when the settlement was made and the check of the Railroad was sent to the Bank.

We are unable to agree with the decision

of the district judge that these policies are inequitable or unconscionable or shocking as applied in this case. The court relied upon an admission by the Bank that the sale of the 8+ acres would not impair its security and on the fact that the 8+ acres were less than 1% of the total acreage covered by the mortgage. We do not think that the record justifies summary judgment on such grounds.

The Bank put in evidence, as part of its response to the Millers' motion for summary judgment, a contract between Robert W. Miller and Patricia M. Miller, the principal plaintiffs, and one Wetsch, dated June 9, 1972, less than two months before the Railroad's action was filed, under which the Millers agreed to sell to Wetsch the property covered by the Bank's mortgage. The total purchase price was $89,500.00. The contract recited that the property was subject to a mortgage of

$43,457.02, payable to the Bank in annual installments of $3,999.98, which Wetsch agreed to pay. Thus at that time the mortgage amounted to just under one-half of the total purchase price. The settlement with the Railroad assigned $4,708.00 to the 8+ acres and $26,692.00 as damage to the value of the remaining land. If this is an accurate measure of the value of the 8+ acres and of the damage to the remaining land, the demand by the Bank for one-half of the total settlement as a means of preventing impairment of its security is by no means unreasonable, much less either shocking or unconscionable.[2]

Moreover, even if the relative values were not as indicated above, (we mention them only because we think that they indicate that a summary judgment on the ground of unconscionability is not justified) we think that the policy of the Bank is a reasonable one. The Bank obtains money

to lend to farmers by issuing short term bonds. It gets no money from the United States Treasury. It exists to provide long terms loans to farmers, at interest as low as will permit it to remain solvent, with a reasonable margin of security. In a period of rising interest rates, when it has long-term low-interest loans outstanding, its ability to make new long-term loans at low-interest rates is necessarily impaired. It must pay higher and higher interest on its short-term bonds while continuing to collect low interest on its long-term loans, such as the Miller loan.

There is nothing in the law that requires the Bank to accede to a partial release of its lien when a portion of the property is sold by the borrower. We are unable to conclude that it is unreasonable, much less unconscionable, for the Bank to have a policy such as the one that it has, under which, where current interest

rates are substantially higher than the interest rate on the outstanding loan, it demands, as consideration for a partial release from the mortgage, either that one-half of the proceeds of the sale be applied against the outstanding loan, or that the loan thereafter carry the same rate of interest that the Bank is then charging on newer loans.

In one sense the policy benefits the borrowers, in that the amount of the loan is reduced. The court refused the Bank's offer to prove that if one-half the settlemeht, $15,700.00, were applied to the mortgage debt, the total amount of interest to be paid would have been reduced by $4,377.90, by reason of reduction of principal and shortening of the amortization period. This is a matter of mathematics, of which the court could and should have taken judicial notice. It is no small benefit to the mortgagors. In another sense, the borrowers can complain because,

if they wish to keep the entire proceeds of the sale, they will have to pay a higher interest rate on the loans. This effect, however, is balanced by the enhanced ability of the Bank to make loans either to the borrower or to other farmers at a lower rate than that at which it would be able to make such loans if the policy in question were not in effect. For these reasons, we conclude that the Bank's policy, the existence of which is not contradicted, is, on its face, a valid policy.

The Bank is not an ordinary commercial enterprise. It is a body created by the Congress to carry out a defined policy. It is not the business of the courts to second guess the Bank's decisions as to how best to do it, so long as the Bank does not violate the terms of the statute that created it. See Greene County National Farm Loan Association v. Federal Land Bank

of Louisville, 6 Cir., 1945, 152 F.2d 215, cert. denied, 328 U.S. 834. As the court there pointed out, supervision of the Bank has been entrusted to the Farm Credit Administration, which in turn is under the supervision of the Secretary of Agriculture. It has not been entrusted to the federal courts. (152 F.2d at 220).

There is conflict between the parties as to whether or not the Bank administered the policy in a fair and uniform manner. Under these circumstances it was improper to grant a summary judgment that the policy is invalid. More than that, we do not think that, absent a showing of irrational deviations from the policy, the policy can be held invalid because the Bank in particular cases relaxes it. This seems to us to be a perfectly reasonable thing for the Bank to do in the light of the facts of each particular situation that confronts it.

IV. The Claim that the Bank Agreed to take One-Half of the Amount of the Settlement Attributed to the Value of the Land Taken.

As we have seen, the Railroad's check assigns $4,708.00 to the value of the land taken, and in the Millers' complaint they assert that two officers of the Association in Billings agreed to accept as the Bank's portion of any settlement one-half of the amount paid for the land taken and to waive whatever claim the Bank might have to any part of the amount assigned to damages to the remaining lands. The Bank does not admit that such an agreement was made but, in line with the views that we have expressed in part III above, we think that if such an agreement had been made in this case, it would be a reasonable agreement and one enforceable against the Bank.

The record indicates that borrowers customarily apply for loans through the local association. Indeed, they are required to do so and to become members themselves,

and the loans are "serviced" by the associations. Under these circumstances, it appears to us that the Association had actual, or at least ostensible, authority to vary the policy in the case of the Miller loan. If, therefore, on a trial, the Millers can persuade a fact finder that the officers of the Association did agree, as the Millers claim, then the Bank can be held to that bargain, and it would be entitled to receive only $2,354.00 out of the settlement and the Millers would be entitled to the balance.

V. The Claim of Fraud.

In submitting the Millers' claim based upon fraud to the jury, the trial court instructed the jury as follows:

> You are instructed that the Court has ruled in a prior proceeding that the defendant was not entitled to require that any of the proceeds of the sale of land to the Burlington Northern be applied against the mortgage debt. You are further instructed that the plaintiffs are entitled to damages for withholding

> of the sum of $31,400.00 from them during the period from November 8, 1972, through April 22, 1974. The measure of such damages is 6 per cent interest thereon during said period, or, in the alternative, such actual damages that you may find from the evidence herein that plaintiffs sustained proximately caused by the withholding of said funds.

In view of the conclusions that we have reached in part III of this opinion, it is obvious that a verdict based upon this instruction cannot stand.

In addition, we are compelled to conclude that the record does not support any claim that the plaintiffs had been defrauded. Plaintiffs' claim of fraud is succinctly stated in the court's instructions to the jury:

> First, that representatives of the Federal Land Bank Association of Billings represented to the plaintiffs that if plaintiffs wanted to make a settlement with Burlington Northern Inc. for the purpose of right of way access for a spur railroad track, that the Federal Land Bank would only require payment to it under its mortgage of one-half of the amount allocated for payment allocated for land conveyed to the Burlington Northern Inc. exclusive of the amount

> allocated to severance damages; second, that the representations were false;. . . seventh, that the plaintiffs relied upon the truth of the representation;. . . ninth, that the plaintiffs were consequently and proximately injured by their reliance upon the representations. . .

The record shows that the only thing that the Millers can claim that they did in reliance upon the alleged misrepresentations by the officers of the Association was to make the settlement with the Railroad. There is no claim that the settlement was not a fair settlement. There is no claim that making the settlement damaged the Millers. The court properly rejected as speculative proffered testimony by one of the Millers that had it not been for what they would have obtained a higher settlement. In short, the notion that the Millers were induced by the representations to take the settlement that they made, and that somehow they might have done something different but for the representations, is sheer

speculation and not a basis upon which to say that the Millers relied upon the truth of the representations to their detriment. The Millers are not repudiating the settlement.

The only damages that the Millers suffered as a result of the Bank's failure to carry out the representations that the Millers say that they relied upon was a delay in their obtaining the money from the settlement. The normal measure of damage for the withholding of money is the legal rate of interest, (R.C.Mont. 1947 §§ 17-303; 47-122; see also 22 Am. Jur.2d Damages, § 180, pp. 257-58) and that rate of interest the Millers will recover on whatever portion of the settlement money they are ultimately held to have been entitled to receive.

The Millers tried to show that because the settlement money was withheld from them, they had to borrow money elsewhere at

somewhat higher rates of interest. The showing was based upon after the fact ratiocination. They also claimed that one of them made a number of trips to Billings to try to persuade the representatives of the Bank to let them have the money. However, it came out that this plaintiff, Robert Miller, was going to college in Billings, that he was there frequently, and that he thus had no particular reason to make a special trip to Billings to talk to the Bank. He failed to identify any particular trip as having that purpose. These kinds of speculative claims of damages will not do.

In short, we are of the opinion that the Millers' claim for relief for fraud and deceit is without sufficient support in the evidence and should be dismissed.

It follows that this is not a proper case for an award of punitive damages and the verdict of the jury awarding $20,000.00

punitive damages must also be reversed.

VI. Attorneys' Fees.

The Millers do not point to any provisions of the laws of Montana, or in any contract, authorizing an award of attorneys' fees to them in this case. Nikles v. Barnes, 1969, 153 Mont. 113, 119-120; 454 P.2d 608, 611-12. Accordingly, the judgment for attorneys' fees must be reversed.

VII. Conclusion.

The judgment entered upon the verdict of the jury is reversed and the claim for relief based upon alleged fraud and deceit is to be dismissed. The partial summary judgment appealed from is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

FOOTNOTES

Page 9

1. On April 22, 1974, pursuant to an offer by the Bank, the Bank endorsed the check and the Millers were able to cash it. In an order authorizing this, the court reserved the Bank's right to recover all or part of the money from the Millers if the court's judgment were reversed.

Page 20

2. No doubt the amount of the settlement between the Railroad and the Millers was in part a result of a well known phenomenon: the value of ranch land grows instantaneously and enormously when a railroad seeks to condemn it. But surely, when the question before the court is market value, the price paid for land in a voluntary settlement is persuasive evidence of that value. The settlement indicates that between June 9, 1972, the value of the ranch had shrunk from $89,500 to $55,100. Thus the Bank's security was drastically reduced.

APPENDIX B

ORDER of United States Court of Appeals

denying petition for rehearing

DATED: December 7, 1978

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W. MILLER and PATRICIA M. MILLER, and HAROLD R. MILLER and BERNICE MILLER, Plaintiffs-Appellees, vs. THE FEDERAL LAND BANK OF SPOKANE, Defendant-Appellant.	No. 76-1216 ORDER

Before: DUNIWAY and WRIGHT, Circuit Judges, and KUNZIG, *Judge, United States Court of Claims

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion of a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested

---

*The Honorable Robert L. Kunzig, sitting by designation.

a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

APPENDIX C

JUDGMENT, United States District Court

Dated: June 5, 1975

C-1

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MONTANA - BILLINGS DIVISION

ROBERT W. MILLER and PATRICIA M. MILLER, and HAROLD R. MILLER and BERNICE MILLER, Plaintiffs, vs. THE FEDERAL LAND BANK OF SPOKANE, Defendants.	CIVIL ACTION FILE NO. 1139 JUDGMENT

This action came on for trial before the Court and a jury, Honorable James F. Battin, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that Compensatory damages in the sum of $3,500 was found in favor of the Plaintiffs and against the Defendants, AND ALSO punitive and exemplary damages in the sum of $20,000 was found by the jury in

favor of the Plaintiffs and against the Defendants.

Dated at Billings, Montana, this 5th day of June, 1975.

JOHN E. PEDERSON
Clerk of Court

By /S/ Ada Alekisch

APPENDIX D

FEDERAL FARM LOAN AMORTIZATION MORTGAGE

Eminent Domain Clause

DATED: June 16, 1966

FEDERAL FARM LOAN
AMORTIZATION MORTGAGE

KNOW ALL MEN BY THESE PRESENTS: That on this 6th day of June, 1966,

Harold R. Miller and
Bernice Miller, husband and
wife; and Robert William
Miller and Patricia Mary
Miller, husband and wife,

thereinafter called the Mortgagor, hereby grant, bargain, sell, convey and mortgage to THE FEDERAL LAND BANK OF SPOKANE, a corporation organized and existing under the Federal Farm Loan Act as amended, with its principal place of business in the City of Spokane, County of Spokane, State of Washington, hereinafter called the Mortgagee, the following described real estate situate in the County of Treasure, State of Montana, to wit:

(Property description)

* * * * *

If any of the mortgaged property shall be taken under right of eminent domain, the mortgagee shall be entitled at its options to receive all compensation for the portion taken and damages to the remaining portion, to be applied by the mortgagee upon the indebtedness hereby secured in such manner as it shall elect.

* * * * *

IN WITNESS WHEREOF, The mortgagors have hereunto set their hands this day and year first above written

/s/ Harold R. Miller

/s/ Bernice Miller

/s/ Robert W. Miller

/s/ Patricia Mary Miller

Recorded with the County Clerk and Recorder of Treasure County the 15th day of June, 1966 at 11:00 a.m.

APPENDIX E

United States District Court for the

District of Montana, Billings Division

TRANSCRIPT

Volume One

Page 118, Lines 20, 21

Date: June 2, 3, 4, 5, 1975

* * *

Q. Did you purchase much of the Miller's farm land which consisted of approximately 2,400 acres after 1972?

A. I purchased some pasture land, yes. And I leased, or farmed the farm land.

* * *

APPENDIX F

JURY INSTRUCTIONS 2, 3, 4, 5 and 6,
United States District Court for
Montana

INSTRUCTION NO. 2

The defendant, The Federal Land Bank, is a corporation and can only act through its officers and employees. Any Act or omission of an officer or employee within the scope of his employment is the action or omission of the defendant corporation.

INSTRUCTION NO. 3

Since a corporation can act only through its officers, or employees, or other agents, the burden is on the plaintiff to establish, by a preponderance of the evidence in the case, that the negligence of one or more officers, or employees, or other agents of the defendant was a proximate cause of any injuries and consequent damages sustained by the plaintiff.

Any negligent act or omission of an officer, or employee, or other agent of a corporation, in the performance of his duties, is held in law to be the negligence of the corporation.

INSTRUCTION NO. 4

An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.

INSTRUCTION NO. 5

You are instructed that Section 2-201 of the Revised Codes of Montana, reads as follows:

"An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from the transaction within such limit, if they had been entered into on his own account, accrue to the principal."

INSTRUCTION NO. 6

You are instructed that Section 2-203 of the Revised Codes of Montana, reads as follows:

"As against a principal, both principal and agent are deemed to have notice of whatever either has notice of and ought, in good faith and the exercise of ordinary care and diligence communicate to the other."

INSTRUCTION NO. 7

You are instructed that the Court has ruled in a prior proceeding that the defendant was not entitled to require that any of the proceeds of the sale of land to the Burlington Northern be applied against the mortgage debt. You are further instructed that the plaintiffs are entitled to damages for the withholding of the sum of $31,400.00 from them during the period from November 8, 1972, through April 22, 1974. The measure of such damages is 6% interest thereon during said period, or, in the alternative, such actual damages that you may find from the evidence herein that plaintiffs sustained proximately caused by the withholding of the said funds.

INSTRUCTION NO. 8

You are hereby instructed that this action is founded upon a charge of fraud, misrepresentation, deceit and that to constitute constructive fraud, within the meaning of Section 13-309 of the Revised Codes of Montana, consists of:

1. In any breach of duty which, without an actually fraudulent intent gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice of anyone claiming under him.

APPENDIX G

Section 17-201, R.C.M., 1947

Section 17-208, R.C.M., 1947

17-201: Person suffering detriment may recover damages. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

17-208: Exemplary damages -- in what cases allowed. In any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

APPENDIX H

BRIEF OF DEFENDANT-APPELLANT, THE FEDERAL LAND BANK OF SPOKANE, Page 37.

DATED: July 14, 1976

* * *

While the verdict for actual damages was only $200 to $300 more than what the interest would have amounted to, the allowance of such testimony was quite harmful to the defendant in that it allowed plaintiffs to make statements regarding inconveniences, feeling and desires which would hever otherwise have gotten into evidence.

* * *

Supreme Court, U. S.
FILED
APR 27 1979
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1530

ROBERT W. MILLER and PATRICIA M. MILLER, and HAROLD R. MILLER and BERNICE MILLER,
Petitioners,

vs.

THE FEDERAL LAND BANK OF SPOKANE, a foreign corporation,
Respondent.

RESPONDENT'S BRIEF

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Petitioners,

vs.

THE FEDERAL LAND BANK OF SPOKANE, a foreign corporation,
Respondent.

RESPONDENT'S BRIEF

QUESTIONS PRESENTED

None of the reasons set forth in Supreme Court Rule 19 (1) (b) calling for an exercise of this Court's power of supervision exist in this case. The decision by the Court of Appeals for the Ninth Circuit is not in conflict with any decision of any other court of appeals and is wholly consistent with the laws of the State of Montana.

Furthermore, we do not agree that the petition accurately presents the controlling issues. The fundamental threshold issue as far as petitioners' case is concerned is as follows:

1. Can a mortgagee be required to release upon demand and without consideration a portion of the property secured by its mortgage in the absence of a contractual provision so requiring; particularly, where the mortgagee is an instrumentality of the federal government whose partial release policies are supportive of the statutory purposes for which is was established?

STATEMENT OF THE CASE

In 1966, the petitioners (hereinafter referred to as "the Millers") borrowed $47,800 from the respondent Federal Land Bank of Spokane (the "FLB") secured by a mortgage on a farm owned by the Millers. In 1972 Burlington Northern Inc. (the "BN") filed a condemnation action for the purpose of acquiring a right of way for a railroad spur track across and through the Millers' farm. After the Millers were served with the summons and complaint in the condemnation action, they entered into an agreement with the railroad to sell to it the desired lands for a total consideration of $31,400, including any severance damages.

The BN issued its check in the sum of $31,400 payable to the Millers and to the FLB. When the FLB refused to endorse the check and grant a partial release of the mortgage without the Millers complying with the FLB's partial release policy, the Millers brought this action.

The mortgage contained a clause providing that if any of the mortgaged property was taken under right of eminent domain, the mortgagee could at its option require that all

compensation received by the mortgagor be applied against the debt secured by the mortgage. (Appendix A-1, p. 4, Petitioners' Brief; 487 F.2d 415, 418.) The FLB's policy regarding application for releases of portions of property secured by mortgages provided, insofar as is pertinent here, that if the interest rate on the loan was less than the interest rate currently being charged on new loans, the granting of the partial release would be conditioned upon either the application of one-half of the sales price to the balance due on the mortgage debt, or, the reamortization of the loan secured by the mortgage at the current rate.

The district court, after ruling that the eminent domain clause in the mortgage was not applicable because an order actually condemning the lands had not been entered prior to the sale of the right of way to the railroad, held that the FLB was not entitled to have *any* of the settlement proceeds applied to the mortgage debt (371 F.Supp. 1105). The case was subsequently submitted to the jury on the issue of damages, with the jury being instructed by the court that the FLB was not entitled to have any of the proceeds of the sale of the lands to the BN applied against the mortgage debt, and, that the Millers were entitled to damages for the wrongful withholding of $31,400 from them from November 8, 1972 through April 22, 1974. (See Appendix I hereto for text of the instruction; record p. 525.)

ARGUMENT

Contrary to petitioners' assertions, the court of appeals did not misconstrue the district court's opinion nor confuse

the eminent domain clause of the mortgage with the partial release policies of the Federal Land Bank of Spokane. A fundamental error of the district court was in brushing aside consideration of the partial release policy of the FLB and in holding, in effect, that the FLB was obligated to grant a partial release of its mortgage without consideration and without its consent upon a sale of a portion of the mortgage lands by the mortgagor. The court of appeals recognized this error, stating:

> "'(A) mortgagee cannot be compelled to accept a part of his debt and release a corresponding part of the land, unless he has expressly agreed to do so. . .' 59 C.J.S. Mortgages § 479, p. 757. We know of no law that would prevent the Bank from demanding a portion of the proceeds of a sale of a part of the mortgaged property as consideration for its willingness to release its lien upon the portion sold, at least provided that what it does is not truly unconscionable. We are unable to agree with the district judge that the Bank's stated policies or its administration of them, as disclosed by the record, are unconscionable."
>
> 587 F.2d at p. 420.

It appears to be the universal rule that a mortgagee cannot be compelled to release a portion of the security covered by its mortgage, even upon tender of a part of the debt, unless he agrees. *59 C.J.S. 757,* Mortgages § 479, *Federal Land Bank v. Clinchfield Lumber & Supply Co.,* Va. 1938, 198 S.E. 437; *Stevahn v. Meidinger,* N.D. 1952, 57 N.W.2d 1, 12-13; *Cassinella v. Allen,* 168 Cal. 677, 144 Pac. 746. The lower court not only compelled the FLB to consent to the sale of a portion of the security, but required it to do so without having any of the proceeds of the sale applied to the debt.

We also dispute petitioners' assertion that the Federal Land Bank's partial release policies were not an issue in the district court on the declaratory judgment count. The Bank's reply brief in connection with the motions for summary judgment before the lower court contained the following:

> "(W)e wish to point out the bank's concern with the condemnation money arises by reason of the request of the borrowers for a partial release of the mortgage, and, if the Burlington Northern were to pay the borrowers without putting the bank's name of the checks and without requesting a partial release of the mortgage, the matter would probably not even come to the attention of the bank. The bank's policy as set forth in their Policy and Operations manual is exactly the same whether the matter comes up by its being made a party to a condemnation action or upon a request for partial release of the mortgage. The property taken by or conveyed to the Burlington Northern was property covered by the mortgage and the Federal Land Bank, by requiring 50 per cent of the proceeds or a reamortization of the loan at current interest rates in exchange for a partial release of the mortgage was following its specifically stated and consistently followed policies relating to the granting of partial releases of its mortgages." (Record, p. 102)

While the district court did not specifically refer to the policies by name they were by necessary implication struck down. The court of appeals appropriately corrected this error.

Petitioners' "questions presented for review" are misleading. Starting with No. 1, Petitioners suggest that the FLB, by amendments to its partial release policies, "jacks

up the interest rates contrary to the terms of the original mortgage agreement". Two basic assumptions in this position are erroneous. First, the impetus for the change in the status of the mortgage did not come from the FLB. It had no intention of disturbing the loan or the interest rates thereon if a partial release had not been requested. Secondly, contrary to Petitioners' assertions, the partial release policy of the FLB as far as it applied to the Millers' situation was essentially the same at the time the mortgage was executed in 1966 as it was when the Millers sold the strip of land in 1972. We quote the pertinent portions of the policy as it was on the date the mortgage was given on June 6, 1966, and as it then had been since January 25, 1961:

> "Under this general heading are detailed the procedures to be followed when a borrower . . . desires to have released from his mortgage . . .
>
> "(1) Any part of his farm or
>
> • • •
>
> "(5) Rights of way or easements, whether by condemnation or otherwise . . .
>
> "GENERAL POLICY
>
> "Loans. A partial release of the security for a loan . . . may be granted under any of the following conditions provided the credit factors are favorable:
>
> "1. Without any payment or other adjustment on the loan when
>
> "(a) The remaining security is sufficient to support the balance of the loan on the basis prescribed for new loans and the interest rate on the loan is at least equal to the bank's minimum refunding rate applicable to the loan;
>
> • • •

> "2. With the application on the loan of the required consideration or appropriate adjustment as indicated:
>
> • • •
>
> "(b) If the interest rate on the loan is less than the bank's minimum refunding rate applicable to the loan, the granting of the partial release will be conditioned upon
>
> "(1) The payment of at least one-half of the present market value or sale price, including severance damages, of the security to the released (whichever is higher) for application on the balance of the loan even though the remaining security is ample to support the remaining loan; or
>
> "(2) The payment of an amount necessary to reduce the remaining loan to the maximum loanable and reamortizing the balance at the minimum refunding interest rate applicable to the loan.
>
> • • •
>
> "*Condemnations.* In general, the policy with respect to partial releases will also apply in the settlement of condemnation suits. • • •"

(The entire text of the partial release policy effective on 1-25-61 and 6-6-66 is set forth in Appendix II hereto.)

The phrase, "the bank's minimum refunding rate applicable to the loan" is related to the interest rate chargeable on current loans and was generally within a half a percentage point of it. Thus, the subsequent amendments to the partial release policy in which the phrases "current interest rate loans" and "less than current rate loans" became to be used were not changes in concept but rather were changes in terminology. Under paragraph 1(a) above, no payment would have to be made on the loan if "the interest rate on the loan (was) at least equal to the bank's minimum refund-

ing rate applicable to the loan", but under paragraph 2(b), if the "interest rate on the loan (was) less than the bank's minimum refunding rate applicable to the loan", the granting of the partial release was conditioned upon either the payment of one-half of the sale price including severance damage (¶2(b) (1)), or, reamortization of the loan at the "minimum refunding interest rate applicable to the loan". ¶2(b) (2).

It is therefore apparent that the Petitioners' rhetoric regarding the FLB's change in the partial release policy affecting the Millers is without any basis and the issue of whether the partial release policies became part of the mortgage contract (which we deny) isn't even in the case.

Regarding petitioners' "Question Presented for Review 2," obviously, the court of appeals in a diversity case is generally required to follow the substantive law of the state wherein the case arose, and in this case the Court of Appeals for the Ninth Circuit did just that. With respect to Question 3, we are unable to understand in what way M.C.A.§ 71-1-222 (formerly R.C.M. 1947, § 93-6001) is relevant to the issues in this case. Petitioners' question Number 4 refers to the mortgagee demanding "immediate compensation and profit from the sale of a right of way easement". No "compensation" or "profit" is involved in these proceedings, only that one-half of the proceeds be applied against the mortgage debt. Regarding Question Number 5, obviously the Federal Land Bank can't nullify and void Montana laws by unilateral amendments of its own policy rules; nor has it attempted to do so.

Petitioners' remaining questions relate to fraud and punitive damages. The district court's ruling on the declaratory judgment count distorted the issues in the case, but even if the ruling had been correct, the issues of fraud and punitive damages should never have gone to the jury.

As is correctly stated in the opinion of the court of appeals, the Federal Land Bank of Spokane exists to provide long-term loans to farmers at the lowest possible interest rates. Its partial release policies are designed to help it to fulfill its purpose. Its ability to do so would be impaired were the policies to be struck down. What gain petitioners seek in this case would be at the expense of the other borrowers and prospective borrowers from the FLB. To strike down the long standing and reasonable partial release policies of the FLB would be detrimental to the basic purposes of the FLB and to the system of farm credit which has served American agriculture so well with no continuing expense to the taxpayers.

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be denied for the reason that the decision of the Ninth Circuit is wholly consistent with Montana law in all rulings favorable to the respondent, and the decision is not in conflict with the decision of any other court of appeals. The petition simply does not present the factual and legal conditions precedent required to move the Court's

discretion in granting the writ of certiorari.

Respectfully submitted.

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CERTIFICATE OF MAILING

The undersigned, GEORGE C. DALTHORP, a member of the Bar of the Supreme Court of the United States does hereby certify that he mailed three copies of the Respondents' Brief to the Petitioners by mailing copies postage prepaid on April 25, 1979, to their counsel, William T. Kelly, 1101 North 27th Street, Billings, Montana, 59101.

GEORGE C. DALTHORP
George C. Dalthorp

APPENDIX I
APPENDIX II

APPENDIX I

Court's Instruction No. 7 given to the jury:

"You are instructed that the Court has ruled in a prior proceeding that the defendant was not entitled to require that any of the proceeds of the sale of land to the Burlington Northern be applied against the mortgage debt. You are further instructed that the plaintiffs are entitled to damages for the withholding of the sum of $31,400.00 from them during the period from November 8, 1972, through April 22, 1974. The measure of such damages is 6% interest thereon during said period, or, in the alternative, such actual damages that you may find from the evidence herein that plaintiffs sustained proximately caused by the withholding of the said funds."

(Record, p. 525)

APPENDIX II

PARTIAL RELEASES

SEC.

Under this general heading are detailed the procedures to be followed when a borrower or purchaser desires to have released from his mortgage or contract, 251

(1) Any part of his farm or gravel or timber thereon;

(2) Buildings or any other permanent improvements;

(3) Oil, gas, or other minerals, or rights to future income from minerals;

(4) Water rights; or

(5) Rights of way or easement, whether by condemnation or otherwise, for a highway, pole line, canal, pipe line, or for other purposes.

GENERAL POLICY

Loans. A partial release of the security for a loan, including the release of minerals and the right to future income from minerals as well as subordinations to mineral leases, may be granted under any of the following conditions provided the credit factors are favorable: 252

1. Without any payment or other adjustment on the loan when

   (a) The remaining security is sufficient to support the balance of the loan on the basis prescribed for new loans and the interest rate on the loan is at least equal

to the bank's minimum refunding rate applicable to the loan; or

(b) The market value or sale price of the security is nominal; or

(c) An inconsequential portion of the security is to be released to a member of the borrower's immediate family, or for a public or charitable use.

2. With the application on the loan of the re- required consideration or appropriate adjustment as indicated:

(a) If the interest rate on the loan is at least equal to the bank's minimum refunding rate applicable to the loan and the remaining security is not sufficient to support the loan, a payment will be required sufficient to reduce the balance to the amount the security will support on a new loan basis, if it is practicable to do so; but if this is not practicable, the remaining loan should be at least as well secured as the existing loan in relation to the normal market value of the security.

(b) If the interest rate on the loan is less than the bank's minimum refunding rate applicable to the loan, the granting of the partial release will be conditioned upon SEC. 252

(1) The payment of at least one-half of the present market value or sale price, including severance damages, of the security to be released (whichever is higher) for application on the balance of the loan even though the remaining security is ample to support the remaining loan; or

(2) The payment of an amount necessary to reduce the remaining loan to the maximum loanable and reamortizing the balance at the minimum refunding interest rate applicable to the loan.

Exceptions

1. If the appropriate conditions exist, the partial release may be granted without consideration under 1(b) or 1(c).

2. Unless required by the association, no payment will be required for consents to easement or consents to removal, except timber given consideration in the appraisal and subject to release only under the provisions of that portion of the manual titled "Loans on Forest Lands—Making and Servicing."

3. In condemnations, depending on the circumstances, more latitude may be allowed in determining the payment required. The reasons for any departure from the stated partial release policy should be reported to the bank.

(c) Application on the loan of the entire net sale price, if the portion to be released is being sold at full value, the partial release on such basis may be granted if it appears to be in the best interests of the bank and the association, even though the application of such amount will not result in reducing the loan to an amount that may be supported on a new loan basis.

Partial releases are granted on a cash basis only and release instruments may not be delivered until the consideration required for application on the loan

is received. Neither may commitment be made for releases to be granted at a future date or for piecemeal releases for subdivisions or similar purposes. Releases of timber and gravel may provide for payment as the timber or gravel is removed and sub-

ordination to mineral leases may likewise provide that the required consideration be paid from mineral income as it is received. With these exceptions, however, releases will be on a cash basis, and application of funds to effect "partial prepayment," i.e., to reduce installments over the remaining term of the loan, will be permitted only when the interest rate on the loan is at least equal to the bank's minimum refunding rate applicable to the loan. If the terms of approval are not met within a reasonable time the commitment will be cancelled and the applicant notified of the cancellation. SEC. 252 *

Condemnations. In general, the policy with respect to partial releases will also appy in the settlement of condemnation suits. In determining the payment to be required the amounts paid for costs and attorney fees may be excluded and consideration may also be given to excluding amounts allowed for fencing or other improvements to be made on the 252.50 *

remaining security; provided reasonable assurance is had that the improvements will be made to the extent necessary to maintain the bank's security margin.

CERTIFICATE OF MAILING

The undersigned, GEORGE C. DALTHORP, a member of the Bar of the Supreme Court of the United States, does hereby certify that he mailed three copies of the Respondents' Brief to the Petitioners by mailing such copies, postage prepaid, on April 25, 1979, to their counsel, William T. Kelly, 1101 North 27th Street, Billings, Montana 59101.

GEORGE C. DALTHORP

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